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May 14, 2004

TO: Commissioners, Public Disclosure Commission

FROM: Nancy Krier, Senior Counsel
Attorney General's Office

SUBJECT: **PETITION FOR RULEMAKING - BACKGROUND**

This memorandum provides background for your May meeting discussion of the April 5, 2004 letter from Elaine D. Willman. The letter is being considered as a Petition for Rulemaking to the Public Disclosure Commission under the State Administrative Procedure Act (APA). The letter was supplemented by Ms. Willman on May 7, 2004 with a Petition for Rulemaking form and additional materials for your consideration.

APA RULEMAKING PETITION PROCESS

Under RCW 34.05.330, any person may petition an agency requesting the adoption, amendment, or repeal of any rule. Within sixty days after submission of a petition, the agency shall either:

- (a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner, or
- (b) initiate rule-making proceedings in accordance with RCW 34.05.320.

PETITION REQUEST – NEW AND AMENDED RULES IN TITLE 390 WAC

Ms. Willman's April 5 letter was sent on behalf of the Washington STAAR Alliance (Standing to Affirm American Rights). Ms. Willman requested the Commission to "*formally pursue a rule making process that fully explores and implements new guidelines and enforcement mechanisms to protect the election process of Washington State from unreported and unlimited infusions of contributions from tribal governments, tribal gambling revenue, and individual tribal members.*" She stated her request was prompted by the March 3, 2004 Third Appellate District Court for the State of California ruling in *Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County and Fair Political Practices Commission*. PDC staff asked her to provide additional information, including whether she was seeking new or amended rules, and any language she was proposing for such rulemaking. On May 7, Ms. Willman submitted a Petition for Rulemaking form, stating she wanted the Commission to adopt a new rule, and to amend Title 390 WAC (no specific section was referenced). She also stated in part that "*It is our belief that WAC 390 et seq. should be expanded to include more precise*

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definition that addresses the public reporting of all monies that impact Washington State elections, regardless of the source, as is the right and duty of the State to preserve and protect the integrity of its elections for its citizens.” She provided a copy of California campaign statutes (California General Code 81000 et. seq.) for Commission consideration regarding “*future rulemaking and or appropriate legislative processes.*” She also provided her proposed amendments to PDC statutes at RCW 42.17.

CALIFORNIA LITIGATION REGARDING TRIBAL IMMUNITY

The court decision Ms. Willman referenced is one of two state court cases pending in California. Both cases concern the ability of a California state agency, the Fair Political Practices Commission (FPPC), to sue tribes for the tribes’ alleged noncompliance with state laws governing filing of campaign contribution reports by contributors. Both cases are still pending. In one case, the FPPC has prevailed so far. In the second case, the FPPC has not prevailed so far. Both cases involve the preliminary narrow question of whether the state can sue the tribes in state court; the merits of the FPPC’s allegations that the tribes have not complied with state campaign laws are not being addressed at this time. Neither case binds the Commission.¹ The cases are being watched nationally. Some suggest that at least one case may be appealed to the U.S. Supreme Court, depending on the outcome in California. Here is a brief summary:

Agua Caliente Band of Cahuilla Indians v. Superior Court of Sacramento County and Fair Political Practices Commission, 116 Cal. App 4th, 10 Cal. Rptr. 3d 679 (March 2, 2004, as modified March 26, 2004) (appeal pending). The FPPC sued an Indian tribe in state court to force it to comply with the reporting requirements for campaign contributions for major donor reports as required in the state’s Political Reform Act. The tribe filed a motion to quash the summons on the ground that the tribe was immune from suit under the doctrine of tribal immunity. The trial court denied the tribe’s motion, and the tribe appealed. ***Held:*** In a 2-1 published decision, the California state appeals court held that the FPPC could rely on the federal constitutional provisions allowing a state to maintain a republican form of government in order to enforce its campaign laws and thus could sue the tribe. The court rejected the tribe’s assertion of tribal immunity from actions against it in state court. ***Status:*** The tribe has appealed to the California State Supreme Court. The appeal is pending.

Fair Political Practices Commission v. Santa Rosa Indian Community of the Santa Rosa Rancheria (appeal pending). The FPCC also alleged in this action that this tribe failed to file major donor campaign contribution reports, and to disclose late contributions. Like the Agua Caliente tribe, this tribe filed a motion to quash the summons, alleging tribal immunity. ***Status:*** The trial court ruled in favor of the tribe in this case, and the FPCC appealed to the state Court of Appeals. As of March 29, the appeal was still pending and no decision has been issued.

¹ If either case is appealed to the U.S. Supreme Court and the Court issues a decision affecting all states, this summary can be revisited.

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OTHER STATES

The potentially broader issue of tribal compliance with state campaign contribution reporting requirements has been addressed by some states or their state courts in the past. For example, the Minnesota Supreme Court ruled in 1981 that a tribal committee was subject to the state's registration and disclosure laws, when the committee paid for political advertisements disseminated outside the reservation that endorsed candidates. *Minnesota State Ethical Practices Board v. Red Lake DFL Committee*, 303 N.W.2d 254 (Minn. Sup. Ct. 1981). In the *Agua Caliente* case in California, Connecticut and Wisconsin representatives filed declarations stating the tribes in their states comply with the states' campaign finance disclosure laws.

WASHINGTON STATE'S CURRENT LAWS AND PDC RULES

The particular type of report at issue in California, the "major donor" report, is not one required in Washington State under current PDC laws.

The Commission's current statutes and implementing rules do not exclude tribes or tribal organizations in the definitions, or distinguish between tribal agencies and other entities. The pertinent definitions are statutory. For example, the definition at RCW 42.17.020(3) states that a "person" is defined as "an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized." A "political committee" is defined as "an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized." RCW 42.17.030(33).

While Ms. Willman seeks amendments to RCW 42.17 and suggests new statutory language, those proposals cannot be addressed through a rulemaking petition.

SUMMARY

- The California case referenced by Ms. Willman as a basis for the Commission to initiate rulemaking is still the subject of ongoing litigation in the California state courts. Another pending case in California reached the opposite conclusion, and that case is also pending. That pending litigation involves the issue of whether California campaign statutes can be enforced against the tribes in state court; these are the same California statutes Ms. Willman asks the Commission to consider. Until those cases reach their final conclusions and can

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be analyzed further, it is the view of PDC staff that they are not ripe for consideration by the Commission as a basis for rulemaking.

- Ms. Willman has not offered language to amend the Commission's rules. Her proposed language references are to: (1) California statutes, and (2) the Commission's statutes in RCW 42.17. Her specific proposed amendatory language is directed to the statutes in RCW 42.17, not to any Commission rule. To the extent she seeks statutory amendments, those proposed amendments must be directed to the Legislature.

I trust this information assists you.

NJK:mjc